

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**



**74-2509**

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No. 74-2509

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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DAVID ARBEITMAN,  
Petitioner-Appellant

v.

DISTRICT COURT OF VERMONT,  
UNIT NO. 5, WASHINGTON CIRCUIT;  
HON. JOHN P. CONNARN, PRESIDING JUDGE,  
Appellees

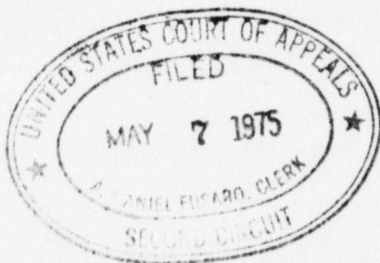
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ON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE DISTRICT OF VERMONT

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APPENDIX

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Richard S. Kohn, Esq.  
Vt.-N.H. Staff Counsel  
American Civil Liberties  
Union of Vermont, Inc.  
43 State Street  
Montpelier, Vermont 05602  
802-223-6304

Attorney for the appellant

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Attorney for the appellant

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CIVIL DOCKET  
UNITED STATES DISTRICT COURT

Civ. 74-109

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Jury demand date:

Form No. 106 Rev.

TITLE OF CASE

ATTORNEYS

DAVID ARBEITMAN

vs.

DISTRICT COURT OF VERMONT, UNIT NO  
5, Washington Circuit; HON. JOHN P.  
CONNARN, Presiding Judge

For plaintiff:

Richard S. Kohn, Esq.  
American Civil Liberties Union of VT  
5 State Street, Montpelier, VT 05602

For defendant:

Richard M. Finn, Ass't. Atty. Gen.  
Office of Atty. Gen., Montpelier, Vt.  
828-3171

STATISTICAL RECORD

COSTS

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1974

NAME OR  
RECEIPT NO.

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UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF VERMONT

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David Arbeitman

v.

Civil Action

District Court of Vermont,  
Unit No. 5, Washington  
Circuit; Hon. John P.  
Connarn, Presiding Judge

File No. 74-109

OPINION AND ORDER

Petitioner David Arbeitman initiated this habeas corpus proceeding after the Vermont Supreme Court affirmed his conviction for the violation of the State's disorderly conduct statute, 13 V.S.A. § 1026(5). See State v. Arbeitman, 131 Vt. 596, 313 A.2d 17 (1973).

Arbeitman was involved in an antiwar demonstration on May 11, 1972 in Montpelier, allegedly protesting the United States' involvement in Vietnam. In the course of this demonstration, Arbeitman sat down in front of one of the doors to the Federal building, thereby effectively impeding people from entering or leaving. Arbeitman was arrested after being warned that his conduct was illegal under 13 V.S.A. § 1026(5), which provides:

A person who, with intent to cause public inconvenience, or annoyance or recklessness creating a risk thereof: (5) obstructs vehicular or pedestrian traffic, shall be imprisoned for not more than 60 days or fined not more than \$500.00 or both.

After being convicted by the trial court, Arbeitman appealed to the Vermont Supreme Court, claiming among other things that the statute was unconstitutional. The Supreme Court in a unanimous opinion upheld both the constitutionality

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of the statute and Arbeitman's conviction. This petition for a writ of habeas corpus followed.

In his petition, Arbeitman alleges that the statute is impermissibly vague and substantially overbroad. He acknowledges that the Vermont Supreme Court may have "saved" the statute by its restrictive interpretation but maintains that such judicial construction may not be applied in the same case in which it was developed. The state has filed a motion to dismiss for failure to state a claim upon which relief can be granted.

I

The vagueness argument

The essence of petitioner's claim that the statute is void for vagueness is that "(t)he term, 'obstructs pedestrian traffic,' is not a comprehensible normative standard." The Court has little difficulty comprehending this standard and holds it is not unconstitutionally vague. "Obstructs pedestrian traffic" is in no way as amorphous a concept as the "treats contemptuously" standard the Supreme Court struck down in Smith v. Goguen, 42 U.S.L.W. 4393 (U.S. March 25, 1974). Nor is the term so vague that "men of common intelligence must necessarily guess at its meaning." Connally v. General Construction Co., 269 U.S. 385, 391 (1926).

A stronger argument perhaps could be made by focusing on the language of the requirement that a person must act "with intent to cause public inconvenience, or annoyance or recklessly creating a risk thereof." In Coates v. City of Cincinnati, 402 U.S. 611 (1971), the Supreme Court

struck down a statute which made it a criminal offense for "three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by." The Court held this statute invalid on both vagueness and overbreadth grounds, "because it subjects the exercise of the right of assembly to an unascertainable standard, and . . . because it authorizes the punishment of constitutionally protected conduct." Id. at 614. The Court focused on the "annoyance" requirement, declaring that "[c]onduct that annoys some people does not annoy others" and that the municipality may not regulate conduct "through the enactment and enforcement of an ordinance whose violation may entirely depend upon whether or not a policeman is annoyed." Id.

There is a vital difference between the Cincinnati ordinance and the Vermont statute. In the ordinance the only measure of criminal conduct is that it consist of an assembly of three or more persons and that it be "annoying to persons passing by." Thus virtually any conduct which is "annoying" could constitute a violation under the ordinance. The Vermont statute is far more definite, as it proscribes specific conduct--the obstruction of vehicular or pedestrian traffic. Consequently it cannot be said to be impermissibly vague.

## II

### The overbreadth argument

Petitioner claims the statute is overbroad because it allegedly can be construed to proscribe activity that is protected by the first amendment--"parades, street assemblies

and protest demonstrations, all labor picketing and any other concerted activity that might cause an obstruction of pedestrian traffic." As the Supreme Court has said, "[a] clear and precise enactment may nevertheless be 'overbroad' if in its reach it prohibits constitutionally protected conduct." Grazed v. City of Rockford, 408 U.S. 104, 114 (1972).

The Vermont statute by its terms involves "speech plus"--that is, it does not seek to prohibit pure speech but rather proscribes conduct which may or may not contain first amendment elements. The alleged flaw is that the statute is so broad that it proscribes "speech plus" activities which are otherwise protected by the first amendment.

The leading case relating to "speech plus" or "symbolic speech" is United States v. O'Brien, 391 U.S. 367 (1968), in which the Supreme Court established that

a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. Id. at 377 (emphasis added).

In this case, Petitioner acknowledges that the first three criteria are met, but claims that the fourth criterion is not. He asserts that the statute is broader than necessary to control pedestrian and vehicular traffic.

The First Circuit Court of Appeals, in Gorman v. Smith, 471 F.2d 88 (1st Cir. 1972) (aff'd on vagueness grounds only, Smith v. Gorman, 42 U.S.L.W. 4393 (U.S. March 25, 1974)) declared Massachusetts' flag desecration statute unconstitutionally overbroad because

(1) the area affected by [the statute] includes a large proportion of First Amendment activities,

(2) [the statute] possesses the potential for a substantial number of impermissible applications, and

(3) immediate and effective excision of the statute's impermissible applications is not foreseeable without continued interruptions of First Amendment freedoms. 471 F.2d at 93.

The difficulty in applying these standards is compounded by the fact that any regulation under extraordinary circumstances could infringe upon first amendment freedoms. The test is whether or not the law will so substantially infringe upon these freedoms as to constitute a "chilling effect" upon their exercise.

If the Vermont statute read "a person who obstructs vehicular or pedestrian traffic [shall be guilty of a criminal offense]," then clearly it would be overbroad. Such a statute would reach a whole range of first amendment activity, and would almost certainly have a "chilling effect" upon persons who sought to exercise their rights. But the Vermont statute is not so broad, since it applies only to those who have the intent "to cause public inconvenience, or annoyance or recklessly creating a risk thereof." It seems patently clear that the statute doesn't apply to the innocent exercise of first amendment rights, but only to specific conduct performed with the requisite intent.

Even if the statute were overbroad as written, the Vermont Supreme Court's interpretation of the statute is clearly within constitutional boundaries and can be applied to the Petitioner in this case. The Court interpreted the statute to require the "obstruction" to be caused by physical activity and not by words or "pure" speech by saying:

As we construe this statute, one cannot be convicted of obstructing traffic with the intent to annoy the public if his intent is to annoy by obstructing by spewing words or ideas at them which they may find offensive, abusive, or distasteful. The obstruction must be a physical obstruction, a result of the body or objects and not of minds or words. 131 Vt. at 602, 313 A.2d at 21.

The Petitioner claims that this interpretation is not sufficiently narrow and that it fails adequately to protect "speech plus" or symbolic speech. Of course, this Court is not in a position authoritatively to construe the Vermont statute; United States v. Thirty-seven Photographs, 402 U.S. 363, 369 (1971), but it seems a fair interpretation of the Vermont Court's language to say that it covers all first amendment activity. The Court said that obstruction by words or ideas would be insufficient, without specifying whether the ideas were to be conveyed orally or symbolically.

Petitioner urges that even if the Vermont Supreme Court's interpretation "saves" the statute, such an interpretation cannot be applied in the very case in which it was developed. In support of this contention, petitioner cites Bouie v. City of Columbia, 378 U.S. 347 (1964) in which the Supreme Court said in dicta at 352-53:

Even where vague statutes are concerned, it has been pointed out that the vice in such an enactment cannot "be cured in a given case by a construction in that very case placing valid limits on the statute," for

"the objection of vagueness is twofold: Inadequate guidance to the individual whose conduct is regulated, and inadequate guidance to the triers of fact. The former objection could not be cured retrospectively by a ruling either of the trial court or the appellate court, though it might be cured for the future by an authoritative judicial gloss . . . ." Freund, The Supreme Court and Civil Liberties, 4 Yale L.J. 203, 241 (1951).

The Court finds that Bouie is not controlling in this case for two reasons. First, the Vermont Supreme Court's action really amounted to statutory interpretation and not "narrowing" an overbroad statute. Second, Bouie properly applies only to (1) the judicial expansion of statutes and (2) the clarification of vague statutes. That Bouie does not apply to the narrowing of overbroad statutes is made clear by the Supreme Court's opinion in Colten v. Kentucky, 407 U.S. 104 (1972), in which the Court let stand the application of a judicially narrowed statute to a defendant in the same case in which the state court developed its interpretation. The Supreme Court made no mention of Bouie.

The dicta in Bouie referred to the impropriety of clarifying a vague statute, and then applying the statute to the defendant at bar. In Colten, however, it appears that state court narrowed an overbroad statute, and then applied it to the case at bar. The difference is important. The vice of a vague statute is that someone is not put on notice that his conduct may be criminal. This violates very fundamental principles of fairness. With an overbroad statute, however, the wrongdoer is put on notice that his conduct will violate the law. Hence the protection provided by Bouie is neither applicable nor necessary.

In view of our determination that the Vermont statute is not unconstitutionally vague or overbroad, Petitioner has failed to state a claim upon which relief can be granted and therefore the defendants' motion to dismiss is hereby granted.

Dated at Burlington in the District of Vermont, this 7th day of October, 1974.

Albert W. Coffrin  
District Judge

*defendant town and computation of the legal tax liability thereon.*

## State of Vermont v. David Arbeitman

[313 A.2d 17]

No. 115-72

Present: Barney, Smith, Keyser, Daley, JJ., and Hill, C. Supr. J.

Opinion Filed December 4, 1973

### 1. Witnesses—Prejudicial Statements—Sentencing

Comment about sentencing, made on witness stand by state's attorney only as anticipated response to a specific question of appellant's counsel, was not prejudicial.

### 2. Criminal Law—Sentence—Determination

Sentencing is solely the function of the trial judge. 13 V.S.A. § 7031.

### 3. Jury—Prejudice—Generally

That there were a large number of challenges for cause during *voir dire* and jury deliberated for only ten minutes before convicting accused, did not show prejudice of jury which was eventually impanelled.

### 4. Jury—Prejudice—Proof

To establish jury's prejudice, appellant who, convicted of obstructing pedestrian traffic during anti-war demonstration, claimed jury was prejudiced against him, was required to show either that right to remove biased and prejudiced jurors was impaired or that jury was other than fair and impartial.

### 5. Jury—Deliberation—Time

The law does not prescribe a mandatory minimum length of time a jury must deliberate before returning a verdict.

### 6. Jury—Deliberation—Time

Where jury deliberation was shortened by such factors as strong evidence of guilt, lack of complex legal issues, and a proper charge by the court, deliberation of ten minutes duration did not indicate jury prejudice.

### 7. Words and Phrases—Obstruct

Term "obstructs", as it appears in statute, must be presumed to have ordinary meaning of the word, and, in charge to jury, definition of word as found in both Webster's Seventh New Collegiate Dictionary and Black's Law Dictionary was not error. 13 V.S.A. § 1026(5).

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**8. Breach of the Peace—Obstructing Pedestrian Traffic—Intent**

Where jury heard testimony that defendant was warned not to obstruct pedestrian traffic, and that he thereafter placed his back against a heavily-used door in order to prevent its use, jury had sufficient grounds for finding the requisite intent to cause public inconvenience or annoyance. 13 V.S.A. § 1026.

**9. Criminal Law—Intent—Proof**

Intent is rarely proven by direct evidence, but is usually inferred from person's acts, and proven by circumstantial evidence.

**10. Breach of the Peace—Construction of Laws—Vagueness**

Defendant, who participated in demonstration which blocked post office doors and who was warned of the law and his violation thereof, could not claim he was held criminally responsible for conduct which he could not reasonably understand to be proscribed.

**11. Appeal and Error—Charge—Generally**

Instructions to the jury may not be isolated in small segments and considered piecemeal but must be measured in their full context.

**12. Breach of the Peace—Obstructing Pedestrian Traffic—Instructions**

Where jury was instructed to find defendant guilty only if it found both actual intent to cause public inconvenience or annoyance and obstruction of pedestrian traffic, the instruction adequately charged the jury on the statute defendant was accused of violating. 13 V.S.A. § 1026(5).

**13. Breach of the Peace—Construction of Laws—Vagueness**

Law making it an offense to obstruct pedestrian traffic with intent to cause public inconvenience or annoyance is not unconstitutionally vague or overbroad on its face.

**14. Breach of the Peace—Obstructing Pedestrian Traffic—Elements Generally**

To constitute a violation of statute prohibiting obstructing public traffic with intent to annoy the public, the obstruction must be physical, a result of the body or objects, for ideas or words, even if offensive, abusive, or distasteful, are not enough. 13 V.S.A. § 1026(5).

**15. Breach of the Peace—Construction of Laws—Validity**

Reasonable regulation of time, place, and manner of expression may be necessary to further significant governmental interests, and such incidental restriction upon symbolic expression will not invalidate an otherwise valid statute.

**16. Breach of the Peace—Obstructing Pedestrian Traffic—State's Interest**

Preventing obstruction of streets and sidewalks is a significant governmental interest.

# 17. Statutes—Construction—Constitutionality

In construing state statutes, the principles which allow avoidance of infringement of First Amendment freedoms, as enunciated by the United States Supreme Court, must be complied with, but one state's approved statutory construction need not become every other state's patterned jury instruction, particularly where the state's statutes proscribe dissimilar conduct.

Prosecution for obstructing pedestrian traffic with intent to cause public inconvenience or annoyance. District Court, Unit No. 5, Washington Circuit, *Connarn, J.*, presiding. *Affirmed.*

*Robert W. Gagnon*, State's Attorney, and *Jean B. Baldwin*, Deputy State's Attorney, for the State.

*James C. Gallagher, Esq.*, of *Downs, Rachlin & Martin*, St. Johnsbury, for Defendant.

**Daley, J.** This is an appeal from a conviction, following a jury trial in the District Court of Vermont, Unit No. 5, Washington Circuit, for obstructing pedestrian traffic with intent to cause public inconvenience or annoyance. Such intentional obstruction is one form of disorderly conduct prohibited by 13 V.S.A. § 1026. The relevant portions of this section provide:

A person who, with intent to cause public inconvenience, or annoyance . . . :

(5) Obstructs . . . pedestrian traffic, shall be imprisoned for not more than 60 days or fined not more than \$500.00 or both.

We affirm the judgment of the lower court.

On May 11, 1972, about 35 people gathered in front of the Federal Building in Montpelier to protest the United States' involvement in the Vietnam War. After allowing them to sit in front of the Post Office doors for approximately three hours, the State's Attorney for Washington County informed them of the law prohibiting obstruction of pedestrian traffic and warned that nondispersal after a ten-minute period would result in arrest.

Appellant was present and heard the State's Attorney's warning. Although most of the demonstrators did disperse

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within the ten-minute grace period, appellant then selected for himself from out of the now more open area a seat directly in front of the outer door. He faced the street and placed his back squarely against the door.

Normally a person entering the Federal Building does so by pulling this door outward, toward himself. During the approximately five-minute span prior to appellant's arrest, two or three people attempted and gained entrance by pulling with sufficient force to slide him far enough out of the way to be able to squeeze in sideways. These people were adult males, and they were aided by a guard inside the building who was pushing outward on the door.

The appellant claims that three events occurring during the trial, taken cumulatively, result in prejudicial error, requiring reversal of his conviction. The first was a comment made by the State's Attorney during cross-examination by the appellant's counsel. This comment related to a warning that the State's Attorney made that a severe sentence would be recommended if the appellant insisted on his right to a jury trial.

[1, 2] It is readily apparent from the record that this comment was made in open court only as an anticipated response to a specific question of the appellant's counsel. The appellant cannot now ask us to entertain a claim of prejudicial taint in his trial that was brought about in his own behalf. Moreover, the State's Attorney withdrew from the prosecution of the appellant when aware that he would be a witness in this case, and the prosecuting attorney in this case made no sentence recommendation following the conviction of the appellant. At any rate, sentencing is solely the function of the trial judge. See 13 V.S.A. § 7031.

[3] The appellant, as his second and third events, presents us with the number of challenges for cause during *voir dire*, which taken together with the fact that the jury returned its verdict after deliberating for ten minutes, establishes the prejudice of the jury against him. The law of this jurisdiction allows for an unlimited number of challenges for cause.

[4] During the course of the *voir dire* examination, certain prospective jurors indicated a hostility toward anti-war demonstrations. All of these jurors were subject to challenge for cause and were excused. In response to the appellant's unrestricted challenges for cause, and which were consequentially granted, he exercised the six peremptory challenges permitted under our law. He has not demonstrated that his right to remove biased and prejudiced prospective jurors was in any way impaired or that the jury that determined his guilt was other than fair and impartial.

[5, 6] Furthermore, the law does not prescribe a mandatory minimum length of time that a jury must deliberate before returning a verdict. *State v. Morrill*, 127 Vt. 506, 509, 253 A.2d 142 (1969); *State v. Lumbra*, 122 Vt. 467, 469, 177 A.2d 356 (1962). Strong evidence of guilt, a lack of complex legal issues, and a proper charge by the court are factors that would naturally speed a jury's return with its verdict. The record shows that all three factors are present in this case.

Therefore, taken either separately or cumulatively, the three events of which the appellant complains do not display prejudicial error. The appellant takes nothing by these claims of error.

The appellant's next attacks on his conviction are based upon the statute itself, 13 V.S.A. § 1026(5). He claims first that he did not "obstruct" pedestrian traffic as prohibited by the statute. To examine the appellant's claim of error, we turn to the charge of the trial court to the jury:

To assist you, hoping I can assist you in some way, I think I should define the word "obstacle" as well as the word "intent". They are very crucial to the offense with which this young man is charged. Webster's Seventh New Collegiate Dictionary defines "obstruct" as follows: "To block or close up by an obstacle; to hinder from passage, action or operation; to impede." Black's Law Dictionary, Third Edition, defines "obstruct" as "To block up; to interpose obstacles; to fill with barriers or impediments; to impede or hinder."

[7] The appellant's challenge on the definition of the word "obstruct" cannot stand. It must be presumed that the Legislature, in using the word "obstruct", intended the ordinary meaning of the word to be the action prohibited. See *Medlar v. Aetna Insurance Company*, 127 Vt. 337, 342, 248 A.2d 740 (1968). The jury was instructed as to the plain, ordinary meaning of the word "obstruct" and so found that he was guilty as charged. No error is shown in this respect to the court's charge.

The appellant also contends that his conviction under 13 V.S.A. § 1026(5) cannot stand because of the manner in which the jury was instructed on the issue of intent; hence, the statute generally and as applied to him is unconstitutionally vague and overbroad.

[8, 9] In order for the jury to return a verdict of guilt, it must have found not only that appellant obstructed pedestrian traffic, but that he did so "with intent to cause public inconvenience, or annoyance." 13 V.S.A. § 1026. Since the jury heard testimony that appellant had listened to the State's Attorney's warning and had thereafter placed his back against the door, it had sufficient grounds for finding the requisite intent. Intent, a state of mind, is rarely proved by direct evidence but is usually inferred from a person's acts and proved by circumstantial evidence. See *Tompkins v. Commonwealth*, 212 Va. 460, 184 S.E.2d 767, 768 (1971); *Johnson v. Commonwealth*, 209 Va. 291, 163 S.E.2d 570, 574 (1968).

[10] This same testimony also shows that appellant cannot claim that he has been "held criminally responsible for conduct which he could not reasonably understand to be proscribed." *United States v. Harriss*, 347 U.S. 612, 617 (1954). See also *Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222, 227 (1972). Thus, if the jury was properly charged, appellant's arguments that the statute is unconstitutionally vague or overbroad, as applied to him, must fail.

Appellant argues that in instructing the jury that it could consider the presumption that one is presumed to intend the natural and probable consequences of his voluntary acts, the court has created the danger of the statute's utilization to

governmental interests, and are permitted." *Grayned v. City of Rockford, supra*, 408 U.S. at 231-32. Preventing obstruction of streets and sidewalks is a significant governmental interest. *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971); *State v. Albers*, 113 N.H. 132, 303 A.2d 197, 201 (1973).

*State v. Albers, supra*, concerned an arrest made at a demonstration against the Vietnam War near the entrance to Pease Air Force Base. The defendant was charged with failing to withdraw from a mob action after being commanded to do so by a police officer under N.H.R.S.A. 609-A:4 (Supp. 1972). The issue was whether N.H.R.S.A. 609-A:1 II, which defined "Mob Action" as "the assembly of two or more persons to do an unlawful act," was void on its face for vagueness and overbreadth. The alleged unlawful act was that of standing in a public highway blocking traffic.

Chief Justice Kenison, after construing "to do" as requiring an intention to commit the unlawful act, thus proscribing prosecutions solely for the initial act of assembling, held the statute to be valid. Addressing himself to the specific alleged unlawful act, he stated:

It is particularly pertinent to this case that well within the domain of legitimate legislation are laws which insure the preservation of the streets for their primary, intended use for travel, even though one mode of "expression"—the obstruction of traffic by a group of demonstrators—may be prevented as a result. *Id.* 303 A.2d at 201.

[17] Finally, the appellant argues that the lower court was required to instruct the jury in the words of a construction placed on a Kentucky statute and mentioned with approval by the Supreme Court of the United States in *Colten v. Kentucky*, 407 U.S. 104, 92 S.Ct. 1953, 32 L.Ed.2d 584 (1972). An examination of *Colten* reveals that the conduct proscribed by the Kentucky statute differs from that proscribed by our statute. As *Grayned v. City of Rockford, supra*, and the two 1973 New Hampshire cases, all decided since *Colten*, illustrate, there are various ways of construing statutes to avoid infringement of First Amendment freedoms. The end result is that the principles enunciated by the United

obtain convictions for conduct which the State has no business regulating. Focusing on this portion of the charge, appellant raises, among other examples, the specter of a mother pushing a baby carriage on a busy sidewalk being imprisoned for violating § 1026(5).

[11] Appellant has failed to consider the lower court's charge in its entirety, something this Court must do. *State v. Stewart*, 129 Vt. 175, 182, 274 A.2d 500 (1971). "Instructions to the jury may not be isolated into small segments and considered piecemeal but must be measured by their full context." *State v. Morrill*, *supra*, 127 Vt. at 511.

[12] "The total instructions correctly stated the true rule of law concerning the offense on trial and the crucial issues." *State v. Reed*, 127 Vt. 532, 540, 253 A.2d 227 (1969). The jury was told that it could find the appellant guilty only after finding that he had both actually intended to cause public inconvenience or annoyance and had obstructed pedestrian traffic. This charge, viewed in its entirety, was adequate, and a conviction under § 1026(5) was not erroneous thereunder.

[13, 14] In light of the purpose and effect of this section, it is not unconstitutionally vague nor overbroad on its face. As we construe this statute, one cannot be convicted of obstructing traffic with the intent to annoy the public if his intent is to annoy by obstructing by spewing words or ideas at them which they may find offensive, abusive, or distasteful. The obstruction must be a physical obstruction, a result of the body or objects and not of minds or words.

Section 1026(5) is not aimed at suppressing expression. It specifies conduct prohibited generally; it is not aimed at demonstrators only. "Persons are free under this statute to express any ideas or convey any message they wish. They are prohibited only from performing the particular acts proscribed by the statute." *Cf. State v. Royal*, — N.H. —, 305 A.2d 676 (1973).

[15, 16] An incidental restriction on symbolic expression will not invalidate an otherwise valid statute. "Our cases make equally clear, . . . that reasonable 'time, place and manner' regulations may be necessary to further significant

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States Supreme Court must be complied with, but one state's construction which saves its statute need not become every other state's patterned jury instruction, and this is especially so where the states' statutes proscribe dissimilar conduct. The construction placed on the Kentucky statute in *Colten* is not necessary to save our more narrowly drawn statute.

The appellant has not here shown prejudice in these proceedings, nor has he here shown that 13 V.S.A. § 1026(5) is invalid either on its face or as here applied.

*Judgment affirmed.*

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In re J. M.

[313 A.2d 30]

No. 119-72

Present: Barney, Smith, Keyser and Daley, JJ., and Hill, C. Supr. J.

Opinion Filed December 4, 1973

1. States—"Parens Patriae"—Safeguards Against Abuse

Safeguards against abuse of powerful *parens patriae* doctrine include notice, counsel, full hearing at which minutes of proceedings are kept, and an order containing the court's findings. 33 V.S.A. §§ 651, 654(a).

2. Infants—Neglected Children—Appeals

Appeal lies to supreme court, from a finding of child neglect, for review of sufficiency of evidence upon which juvenile court reached that finding.

3. Constitutional Law—Due Process—Child Neglect Proceedings

Due process rights attach to cases involving protection of children.

4. Appeal and Error—Findings—Supporting Judgment

Adequate findings of fact must be made where a child is found to be neglected, so that on appeal the supreme court can determine whether the facts found support the judgment.

5. Infants—Neglected Children—Findings

Lower courts must carry out their duty to state facts which bring a particular neglected child case within the ambit of the statutory law, for the supreme court will no longer search the record nor will it accept conclusionary findings which merely repeat the definition of neglected child set forth in the statutes. 33 V.S.A. § 632(a) (12); V.R.C.P. 52.

2. Charge

OFFICER'S COMPLAINT

STATE OF VERMONT,

To the District Court of Vermont, Unit No. 5

Washington County, ss. } Washington Circuit, in the County of Washington

comes Stewart Kennedy

Deputy Sheriff of the County of Washington

Police Officer of The City of Montpelier

Constable of the Town of

Deputy Fish and Game Warden of the State of Vermont

State Police Officer of the State of Vermont

Stewart Kennedy

and brings before said Court David Arbeitman

of Plattsfield in the County of Washington

and alleges that on the 11th day of May 192 at

Montpelier in said County of Washington he found the said

David Arbeitman in the act of committing the offense hereinafter complained of

and that he then and there arrested the said David Arbeitman without Warrant.

And the officer aforesaid, in his proper person and on his oath of office, makes complaint that the said

at Montpelier

in the County of Washington on, to-wit, the 11th day of

May 1972:

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Did then and there with intent to cause public inconvenience  
and public annoyance obstruct ~~vehicular~~ pedestrian traffic  
in violation of 13 V.S.A. §1026(5)

contrary to the form of the statute, in such case made and provided, and against the peace and dignity of the State

Dated at Montpelier in the County of Washington

this 11th day of May 1972

*[Signature]*  
Sheriff - Deputy Sheriff - Constable - Police Officer  
State Police Officer - Fish and Game Warden

The foregoing complaint was exhibited to the Court this 11th day of May 1972

*[Signature]*  
Judge - Clerk

15M-12-69

DAVID ALAN ARBEITMAN, SWORN

DIRECT EXAMINATION

BY MR. RACHLIN:

Q Mr. Arbeitman, will you tell the jurors your full name, please?

A My name is David Alan Arbeitman.

Q How old are you, David?

A I am twenty-one years old.

Q Where is your home?

A Initially, I was born in New York.

Q Where is your home now?

A I have been living in Plainfield for the last seven or eight weeks, or so. I am going to school there.

Q Are you a student at Goddard?

A Yes.

Q What year are you in at Goddard?

A I am a Senior. This is my final trimester. I will graduate in August.

Q What are your plans on graduation?

A I consider traveling for a while.

Q What is your major?

A Psychology and Education.

Q Did there come a time you participated in a demonstration at or near the Federal building in Montpelier that has been described here earlier?

A Yes, there was.

Q On that occasion, were you motivated to participate in this demonstration by some particular event?

A I guess the thing that provoked me particularly was the mining of Haiphong and accelerated activity regarding the war in Vietnam.

Q What was your purpose in participating in this demonstration?

A To arouse the public to the fact of the war being accelerated rather than being discontinued and to let people know there were still people who dissented, who were opposed to our foreign policy in respect to Southeast Asia.

Q Without indicating....without getting into your views on that issue, would it be fair to state that your purpose in participating in this demonstration was to express your opinion?

A That is a fair statement.

Q How many people were there in all at this demonstration?

A Overall, there were about fifty people participating.

Q In your opinion, was this demonstration a peaceful one?

A Definitely, yes.

Q Did you or any member of the group offer violence to anybody or anything?

A No.

Q Did you use any obscene or profane language to anybody?

A No.

Q Did you harrass anybody?

A No, not really.

Q David, did there come a time you and some others attempted to gain entrance into the Federal building?

A Yes.

Q What was your purpose in trying to get admitted to the Federal building?

A There were several people who protested the fact that although some students were allowed entrance, demonstrators were not.

Q That was not my question. My question was....

MR. GAGNON: YOur Honor, in view of that response, I ask it

Q Did there come a time you seated yourself near the State Street entrance to the Federal building?

A Can you be more exact?

Q Did you seat yourself, at some time, near one of the entrances to the Federal building?

A At the beginning, when I first arrived, there were a number of people sitting in front of the Federal building and I joined them. I wasn't directly in front of the door. There came another time later.

Q Did there come a time, as has been described by the other witnesses, when you alone seated yourself in front or by or near the door to the Federal building?

A Yes.

Q Where were you seated with reference to the door?

A If I remember correctly, there were two doors and I sat facing the Federal building. I sat in front of the one at the right.

Q During the time you were seated there, did any people make effort to go in or out of the door you were sitting in front of?

A Yes.

Q Were they able to do so?

A Yes, they were able to enter.

Q Did you exert any physical pressure or force against the door to prevent them from opening it?

A Just to maintain my balance. I wasn't as forceable as I could have been.

Q Will you describe just what you did as people would come to open the door?

A When the door was being opened, I would brace myself because I knew I would be shoved out of the way.

Q Did there come a time you seated yourself near the State Street entrance to the Federal building?

A Can you be more exact?

Q Did you seat yourself, at some time, near one of the entrances to the Federal building?

A At the beginning, when I first arrived, there were a number of people sitting in front of the Federal building and I joined them. I wasn't directly in front of the door. There came another time later.

Q Did there come a time, as has been described by the other witnesses, when you alone seated yourself in front or by or near the door to the Federal building?

A Yes.

Q Where were you seated with reference to the door?

A If I remember correctly, there were two doors and I sat facing the Federal building. I sat in front of the one at the right.

Q During the time you were seated there, did any people make effort to go in or out of the door you were sitting in front of?

A Yes.

Q Were they able to do so?

A Yes, they were able to enter.

Q Did you exert any physical pressure or force against the door to prevent them from opening it?

A Just to maintain my balance. I wasn't as forceable as I could have been.

Q Will you describe just what you did as people would come to open the door?

A When the door was being opened, I would brace myself because I knew I would be shoved out of the way.

Q Why did you know you would be shoved out of the way?

A It was obvious people had the power to displace me.

Q How tall are you?

A Five feet, two inches.

Q How much do you weigh?

A Approximately 115.

Q Did these people have any great difficulty in moving you out of the way?

A I don't think so. The guard inside was helping them. He was pushing and they were pulling.

Q Was there any pedestrian, citizen, or person tried to get in or out of the building unable to do so while you were sitting where you described?

A No; anybody attempting entrance, was able to get in.

Q Was it your primary intent in this situation to cause inconvenience or annoyance to the public?

A No, my primary intent was to symbolically express my opinion regarding the Vietnam war. I was attempting to graphically make a statement about my feelings about the Vietnam war.

Q Was it actually your intent or ever your intent to actually close down the Federal building?

A No, my act was more symbolic.

Q Did you, in fact, close down the Federal building?

A No, I failed to do so; I didn't even attempt to do so.

Q When you say you intended a symbolic act, what do you mean?

A It is something that signifies something else. More specifically, in terms of presenting myself bodily, I was making a statement by offering some resistance and pronouncing my views that the foreign policy of this Nation is on a bad course.

Q As pedestrians approached the door and attempt to enter, did you grab onto their sleeves or garments in any way?

A No.

Q Did you threaten anybody by words or expression or anything else if they attempted to enter? Did you threaten they would come to some harm?

A No, it was perfectly quiet.

Q There came a time when Officer Kennedy asked you<sup>to</sup> go with him and told you you were under arrest?

A Yes, there was.

Q Did you go with him peaceably?

A Yes.

Q Did you offer any resistance?

A No, I didn't.

Q Did you go limp; make him carry you out?

A No, I tried to cooperate as much as possible.

Q Did you abuse the Officer with words?

A No, I tried to be very serious.

Q Did you walk on your own steam where you had to go?

A Yes.

MR. RACHLIN: You may inquire.

## CROSS EXAMINATION

BY MR. GAGNON:

Q Mr. Arbeitman, you said your purpose in being in the Federal building was to protest the war; is that correct?

A Yes, it is correct.

Q And the means you used to express this protest was by sitting yourself against the door being used by people entering and leaving?

A Yes.

Q Did you intend to use this means?

A I don't know what you mean.

Q Did you intend to sit down where you did in front of that door?

A Just before I did it, yes.

Q Did you understand that the consequence of that act would mean you would have to be forcefully pushed out of the way?

A I didn't really know what was going to happen.

Q After the first time this occurred, did you realize this would have to occur in the future?

A I realized if anybody else tried to get in they would probably shove me aside as they did the first time.

Q They would have to - isn't that correct?

A Yes.

Q After the first time you were pushed aside, didn't you intend remaining sitting there; that anyone else would have to push you aside?

A That wasn't my intention. My intention was to make a symbolic gesture.

STATE OF VERMONT  
WASHINGTON COUNTY, SS

VERMONT DISTRICT COURT  
WASHINGTON CIRCUIT - Unit No. V  
C.A. No. 1416-Wncr

STATE OF VERMONT )  
 )  
 v )  
 )  
 DAVID ARBEITMAN )

RESPONDENT'S REQUESTS TO CHARGE

1. You may not find Mr. Arbeitman guilty merely by finding that he obstructed pedestrian traffic on the occasion in question. The statute under which he is being tried prohibits the obstruction of pedestrian traffic only where the intent of the person is to cause public inconvenience or annoyance or where his conduct recklessly creates a risk thereof.

2. The Vermont and United States constitutions guarantee every person the right of peaceful assembly and the right freely to express opinions, even though the exercise of such right or rights may from time to time cause public inconvenience or annoyance. Mr. Arbeitman is not guilty of violating the statute under which he is being tried if his conduct was intended primarily to bear witness to a particular viewpoint or opinion and not primarily to cause public inconvenience or annoyance, even though the exercise of his rights of free assembly and speech may in fact have caused public inconvenience or annoyance.

3. I charge you that Mr. Arbeitman was entitled to enter the federal building in Montpelier for the purpose of peacefully expressing his opinions or peacefully seeking audience with public employees or officials present in the building. The exclusion of

Mr. Arbeitman from the federal building was unlawful unless those excluding him had substantial reason to believe that his admission to the building would result in unlawful conduct by Mr. Arbeitman. If you find that Mr. Arbeitman was unlawfully excluded from the federal building and that he situated himself in front of the door in an effort to obtain admittance to the building in order to exercise a lawful activity or purpose, then his intent in situating himself in front of the door was not to cause public inconvenience or annoyance, even though his conduct may in fact have had that effect.

4. Merely obstructing pedestrian traffic is not an offense.

If two people walk down a street together they are in fact obstructing pedestrian traffic to the extent of the space they occupy as they walk. Obstructing pedestrian traffic becomes an offense only when its purpose is to cause public inconvenience or annoyance or when it is done in reckless disregard of the likelihood that it will cause public inconvenience or annoyance without any redeeming purpose of a constitutionally protected nature.

St. Johnsbury, Vermont, June 26, 1972.

DOWNS, RACHLIN & MARTIN

By (Signed) Robert D. Rachlin  
Robert D. Rachlin  
A member of the firm.

Ladies and Gentlemen: We have come to the time in this case when it is my duty to charge you on what the law is that you will apply in this case and the State of Vermont alleges the Respondent has violated the law and alleges in the Officer's Complaint that the Respondent, David Arbeitman did, in Montpelier, on May 11 of this year, with intent to cause public inconvenience and public annoyance obstruct pedestrian traffic.

Our law provides that a person shall not, with intent to cause public inconvenience and public annoyance, obstruct pedestrian traffic. The Defendant has admitted he was at the Federal building, or the Post Office building if you will, at the time and place alleged. The question which we will go into is whether he possessed the intent, at the time, to cause public inconvenience or annoyance to pedestrian traffic at that time and place.

Under our law, the Respondent is presumed innocent, ladies and gentlemen, and this presumption attends him until you return a verdict of Guilty if this is your decision. The fact the Respondent is here under an Officer's Complaint charging him with the offense alleged is not, in itself, to be taken against him. The Officer's Complaint which has been brought against the Respondent, in itself, is no evidence whatsoever of his guilt or lack of guilt; it is simply an accusation which, in this case, charges him with the offense in question and no juror should allow himself or herself to be influenced in the least degree by the fact this Respondent is here under this Officer's Complaint.

The burden of proof is on the State to make out every essential element against the Respondent beyond a reasonable doubt. You cannot find

Arbeitsman

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him guilty unless, from all the evidence before you, you believe him guilty beyond a reasonable doubt.

Reasonable doubt does not mean a fancied doubt; it means a doubt that is reasonable in view of all the circumstances. A doubt, in other words, based on reason. If, after an impartial consideration of all of the evidence upon the charge you are not satisfied as to the Respondent's guilt, then you have a reasonable doubt and your verdict should be one of Not Guilty. On the other hand if, after an impartial consideration of all of the evidence you can honestly say you have an abiding conviction of the Respondent's guilt, then you have no reasonable doubt and you should find him Guilty.

The credibility of the witnesses you have heard on the witness stand, or believeability of those witnesses, and the weight to be given their testimony are matters entirely for your consideration. You are not bound to give the same weight to the testimony of each witness. You should give the testimony such weight as you think it is fairly entitled to receive after considering each witness' appearance on the stand, his truthfulness or lack of it; his feelings or bias, if any; his interest in the outcome of the case, if any; his relationship to the parties; his means of information; his opportunity for observing, seeing and hearing; his ability to report the things he saw and heard, or the lack of it; and the reasonableness of the testimony he gave. In other words, as to each witness, does his testimony ring true; does his story bear such a stamp of credit that you would consider him believable and safe to rely upon as a guide to the truth.

The State of Vermont has introduced witnesses in this case. The relationship of the State to witnesses it introduces is different than

that of a private party to its witnesses. The State has no partisan end to serve. It is as much interested in clearing the innocent as to convict the guilty. Consequently, the State is under a duty to produce and use all witnesses of whatever character whose testimony, in the light and belief of those who represent the State, may shed any light upon the investigation to aid you in arriving at the truth. As to these witnesses, you may believe all the testimony of a witness or believe it in part, disbelieve it in part or you may reject it altogether.

In this case, the Respondent Mr. Arbeitman, did take the witness stand. The law provides he does not have to be a witness against himself. He took the stand voluntarily and the law makes him a competent witness at his own request and not otherwise. The credit to be given his testimony rests solely with you and you will consider it in view of his interest in the outcome of the trial and give it such weight as you think it is fairly entitled to receive.

Any testimony which has been excluded from the record or stricken from the record at the request of either the State or the Respondent is not evidence in the case and you will entirely disregard it in arriving at your verdict. Likewise, the arguments of the Attorneys and any statements which they made in their arguments are not evidence and you will not consider it. You will render your verdict from the facts as you find them from the testimony of the witnesses. It is your recollection of the witnesses' testimony and not the Attorneys' statements as to what that testimony was which shall control you in reaching your decision. You don't have to use any different methods of reasoning or logic than you use in your own ordinary, every day affairs. The responsibility to the State of Vermont and to the Respondent is yours on all questions of fact. Decide them as your conscience dictates.

To assist you, hoping I can assist you in some way, I think I should define the word "obstacle" as well as the word "intent". They are very crucial to the offense with which this young man is charged. *obstruction*

Webster's Seventh New Collegiate Dictionary defines "obstruct" as follows: "To block or close up by an obstacle; to hinder from passage, action or operation; to impede." Black's Law Dictionary, Third Edition, defines "obstruct" as "To block up; to interpose obstacles; to fill with barriers or impediments; to impede or hinder." Black's Law Dictionary, Third Edition, defines "Intent" as follows: "It is a resolve to do a particular act. It is the exercise of intelligent will, the mind being fully aware of the nature and consequences of the act which is about to be done and with such knowledge and with full liberty of action willing and electing to do it."

You may not find Mr. Arbeitman guilty merely by finding that he obstructed pedestrian traffic on the occasion in question. The statute under which he is being tried prohibits the obstruction of pedestrian traffic only where the intent of the person is to cause public inconvenience or annoyance. The act must be coupled with the intent. Both must be present.

Now, the Vermont and United States constitutions guarantee every person the right of peaceful assembly and the right freely to express opinions. The question here is whether, in the exercise of those rights, this Respondent has gone beyond the rights of peaceful assembly and the right to express opinions. That is a question for you to determine. In other words, did the Respondent, body positioned as it was in front of the door, constitute in your minds an obstacle. It is a question of fact for you to determine.

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The Law provides that everyone is presumed to intend the natural and probable consequences of his voluntary act. It is for you to determine whether the Respondent possessed the intent to do the act prohibited. If you find the Respondent possessed the intent defined to you to cause public inconvenience or annoyance, you should find him guilty. If you find the Respondent did not possess the intent to cause public inconvenience or annoyance, you should find him Not Guilty.

Counsel have anything they want to say before I appoint a Foreman and turn the case over to the jury?

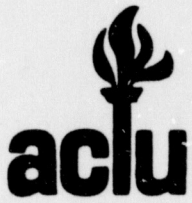
AT BENCH:

MR. RACHLIN:

Defendant respectfully excepts to the Court's failure to instruct as requested in Respondent's Request No. 2, 4 and Supplemental Request No. 1. We also except to the Court's having charged the jury that the Defendant is presumed to intend the natural and probable consequences of his act. While that is correct in principle in the abstract, we think it is entirely out of place here in view of the fact all kinds of constitutionally protected activities can have the consequence naturally and probably of causing public inconvenience. We think it is not enough for the jury to find intent within the meaning of this law merely by finding that the natural and probable consequences of Mr. Arbeitman's act was to cause such inconvenience or annoyance.

MR. GAGNON:

I have nothing.



American Civil  
Liberties Union  
of Vermont

43 State St., Montpelier, Vt. 05602 - 802-223-6304  
May 6, 1975

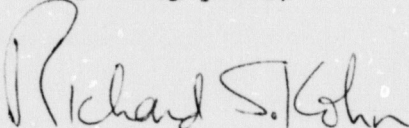
A. Daniel Fusaro  
Clerk  
United States Court of Appeals  
for the Second Circuit  
U.S. Courthouse  
Foley Square, New York 10007

RE: Arbeitman v. Vermont District Court  
No. 74-2509

Dear Mr. Fusaro,

I am enclosing ten copies of the appendix in the above  
captioned case.

Very truly yours,

  
Richard S. Kohn

CC. Richard Finn, Ass't. Attorney General

David S. Harrison, Executive Director; Richard S. Kohn, Vt-N.H. Staff Counsel; Joan Webster, President